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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

DATE: JUL 2 3 2012 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The AAO will dismiss the motion to reconsider, grant the motion to reopen, and affirm the dismissal of the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences and as a member of the professions holding an advanced degree. The petitioner seeks employment as a physician. At the time he filed the petition, the petitioner was a fellow in medical oncology at East Tennessee State University (ETSU), Johnson City; his most recent authorized employment is for University of Iowa Community Medical Services. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The AAO affirmed the director's decision and dismissed the petitioner's appeal.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner has not established that the decision was based on an incorrect application of law or Service policy, or that the decision was incorrect based on the evidence of record at the time of the initial decision. Therefore, the motion does not meet the requirements of a motion to reconsider, and the AAO must dismiss the motion. The petitioner has, however, stated new facts and provided supporting documentary evidence. The evidence relates to the petitioner's activities after the petition's filing date, but because the AAO based its decision, in part, on the petitioner's likely future activities, this new evidence is relevant to the proceeding at hand. The AAO will grant the motion to reopen, and give due consideration to the new evidence.

On motion, the petitioner submits a two-page brief from counsel and numerous exhibits, almost all of them copies of materials already in the record. Copies of previously submitted documents cannot establish new facts, and their resubmission cannot add substantive support to a motion. In the present decision, the AAO will limit consideration to the new brief and the three new exhibits submitted on motion, to be discussed below. The petitioner filed the Form I-140 petition on June 23, 2010. The director denied the petition on August 31, 2010, and the AAO dismissed the petitioner's appeal on December 15, 2011. The AAO incorporates its prior decision by reference, and will quote or summarize relevant passages as necessary in the present decision.
Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –

> (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of Job Offer –
>
> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The record readily establishes that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

Counsel, on motion, contends that the AAO erred by finding that the petitioner's work lacks national scope, and that the petitioner had not established that a waiver of the job offer requirement would be in the national interest. The AAO will first examine the question of national scope. In its dismissal decision of December 2011, the AAO stated:

> The [petitioner's] *curriculum vitae* listed three items under the heading "Publications/Research." Two of the items were scholarly articles . . . [that each] centered on the presentation of one patient's case. The third item indicated that the petitioner was "Currently Involved in National Institutes of Health's R-25 Research Grant, Cancer Stories Project with Dr. Forrest Lange and associates."
>
> . . . [T]he petitioner acknowledged that his current position amounted to "training." The petitioner submitted no documentary evidence to show that he would continue to engage in research after his training was complete. . . .
>
> In the denial notice, the director acknowledged the intrinsic merit of medicine, but found that the petitioner had not shown that his intended future work has national scope. Rather, the director determined that the petitioner's "impact will be limited to the hospital in which he will practice; therefore, the benefit of his skills will be limited to a small area."
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> . . . Counsel asserts [on appeal] that the petitioner's "work towards the cure of cancer [is] national in scope." Published research is national in scope, but the petitioner's minimal research record appears to be tied to his ongoing training at ETSU. The record is devoid of evidence that the petitioner will be a researcher, rather than a clinical oncologist, after he completes his training. Furthermore, the only research that the petitioner appears to have been conducting as of the petition's filing date is the oft-touted NIH project which, according to witnesses, concerns "communication with cancer patients" rather than "the cure of cancer."

On motion, counsel states that "it was not reasonable for the A.A.O. to conclude that cancer research work in one location could not have national implications or benefits." The AAO, however, did not conclude that "cancer research work" lacked national scope. Rather, the AAO noted the petitioner's own assertion that he was still a "trainee," and that there was no evidence that the petitioner would continue to conduct research after he completed his training. Treating patients in a clinical setting does not inherently constitute "research." Thus, counsel faults the AAO for an error it did not make.

Counsel cites a "recently published article . . . published in a national, peer-reviewed journal" that "clearly demonstrates [the petitioner's] continued research work even beyond the completion of his training program." The "article" in question, submitted on motion, is a "Letter to the Editor" that appeared in the online edition of *Bone Marrow Transplantation* on November 14, 2011. A printout of a page from the journal's web site, http://www.nature.com/bmt/about.html, provides general information about the journal but does not say whether a "letter to the editor" is a peer-reviewed article that reports new, original research.

[redacted] is one of four individuals identified as an author of the letter; the other three authors are previously unmentioned in the record. All of the letter's authors claim affiliation with Vanderbilt University Medical Center and Veterans Affairs Medical Center, both in Nashville, Tennessee. According to change of address notices that the petitioner himself filed with USCIS, the petitioner left Tennessee in June 2011 and has since resided in Ottumwa, Iowa; his only current authorized employer, according to USCIS records, is in Iowa City, Iowa. Both of those Iowa cities are more than 500 miles northwest of Nashville. The petitioner has submitted nothing to show that he is the [redacted] identified in the *Bone Marrow Transplantation* letter.

Even if the petitioner is the same [redacted] the letter refers to "[o]ur recently published study," identified at endnote number 4. The article so identified, however, does not include [redacted] among its authors; its coauthors included only two of the four signers of the "letter to the editor," indicating that the "our" was institutional rather than personal. Thus, the letter's reference to "[a]n ongoing study at our institution" does not imply that [redacted] is participating in that study as a researcher. The letter does not report new original research, but rather comments on prior research by authors other than [redacted] at an institution where the petitioner has never before claimed employment. The letter is not evidence that the petitioner has engaged in research since he left Tennessee for Iowa in mid-2011.

The petitioner's motion also includes a copy of a letter from Dr. [redacted] of the Commission on Cancer (CoC). The letter is addressed to the petitioner in Ottumwa, Iowa, and dated July 29, 2011, thus placing the petitioner in Iowa rather than Tennessee in the latter half of 2011. The letter reads, in part:

> I would like to congratulate you on your recent appointment as Cancer Liaison Physician (CLP) at Regional Cares – Ottumwa Regional Health Center. Effective July 1, 2011, the tenure of this appointment is for three years. . . .

> You are part of an exclusive network of 1,500 physician volunteers charged with the task of providing leadership and improving the quality of cancer care in cancer programs across the country. Effective January 2012 the role of the CLP will be enhanced according to a new standard (4.3). CLPs will be responsible for activities in four areas: (1) monitoring and interpreting your program's performance using NCDB data and using the information to evaluate and improve the quality of care your facility provides, (2) reporting on CoC activities, initiatives and priorities to the cancer committee, (3) serving as liaison for the cancer program with the American Cancer Society, and (4) being present during the CoC survey and meeting with the surveyor.

Dr. [redacted] letter does not indicate that a CLP's duties include active participation in cancer research. Rather, the letter indicates that the CLP is responsible for making sure that the CLP's own employing institution complies with CoC goals and practices. As such, the letter does not show that a CLP's duties are national in scope.

For the reasons discussed above, the petitioner's new evidence does not show that his post-training work has national scope. The AAO affirms its prior finding to that effect.

Concerning the third prong of the *NYSDOT* national interest test, the AAO previously stated that the director "found that the petitioner failed to distinguish himself from other physicians to an extent that would justify an exemption from the statutory job offer requirement." The AAO acknowledged the petitioner's submission of several witness letters, but noted: "All of the witnesses are on the faculty of a single university medical school. Their statements, therefore, are not first-hand evidence that the petitioner's work has attracted any significant notice outside of ETSU." The AAO observed that one of the petitioner's witnesses "has done little more than list the items on the beneficiary's *curriculum vitae* and declare that they establish the petitioner's eligibility for the waiver." The AAO further acknowledged the petitioner's submission of various exhibits and his participation in various programs, but found that none of these materials intrinsically demonstrated the petitioner's eligibility for the national interest waiver, and that a witness's claim that the petitioner's "publications are read by physicians throughout the United States" amounted to "unsupported speculation." The AAO concluded: "The record overwhelmingly indicates that the petitioner's body of work, as a whole, has attracted little notice outside of ETSU (where all of the petitioner's witnesses serve on the faculty)."

Counsel states: "Unhappily, the A.A.O. has done nothing more than apply the same minimal boilerplate analysis exhibited by the Petition's initial denial." Counsel contends that the AAO should have given more weight to "[c]arefully drafted witness testimony," instead of faulting the petitioner for the lack of "discrete documentary evidence in support of" that testimony. The AAO has already explained its position on the witness letters in the record, devoting several pages of its prior decision to the subject. The AAO need not revisit its findings simply because counsel deems the AAO's analysis to be "minimal" or "boilerplate," and counsel offers no legal or logical premises to support the contention that the AAO and USCIS must unquestioningly accept unsubstantiated witness claims as fact. The AAO previously cited binding precedent decisions in this matter, and will add here the Board of Immigration Appeals' observation that expert opinion testimony does not

purport to be evidence as to "fact." *See Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008). An uncorroborated claim does not and cannot take on the weight of documented fact simply because that claim comes from a third party rather than directly from the petitioner. Otherwise, the petitioner could evade a substantial part of his burden of proof simply by asking witnesses to include various claims in their letters on his behalf.

The AAO, in its dismissal notice, acknowledged that the director mistakenly referred to the petitioner as a gastroenterologist, but concluded that the reference was a harmless error that did not affect the outcome of the decision. The word "gastroenterologist" appears only once in the decision, on page 4, where the director stated: "the record contains no evidence that his work has made a significant contribution to the world of doctors serving as gastroenterologist."[1] In contrast, the decision contains multiple references to the petitioner's true specialty, oncology. The second sentence in the body of the decision correctly referred to the petitioner as a "Physician in the field of Medical Oncology."

On motion, counsel asserts: "It . . . is hard to reconcile how the erroneous description of [the petitioner] as a gastroenterologist could be considered a 'harmless error,'" because gastroenterology is not closely related to cancer research. As the AAO previously noted, the director's decision contains numerous specific and accurate references to the evidence of record, and quotations from witness letters. Therefore, the misidentification of the petitioner as a gastroenterologist does not prove or even suggest that the director reviewed the wrong record of proceeding. Reading the decision as a whole (instead of taking one sentence out of context), it is abundantly clear that the director knew the petitioner was an oncologist at ETSU.

The error is harmless because it "clearly had no bearing on the procedure used or the substance of the decision reached." *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir.2004)). One cannot read the director's decision and conclude that the director would have approved the petition, but for the mistaken belief that the petitioner is a gastroenterologist. At no time did the director conclude that the petition had to be denied because gastroenterologists do not conduct cancer research. An isolated misidentification of the petitioner's medical specialty, surrounded by more accurate information, did not prejudice or change the outcome of the decision, and the AAO affirms its prior finding that the director's accidental use of the word "gastroenterologist" amounts to harmless error rather than a material error of fact that led to the erroneous denial of a petition that the director should have approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The motion to reconsider is dismissed. The motion to reopen is granted. The AAO's previous decision of December 15, 2011 is affirmed. The petition remains denied and the appeal remains dismissed.

[1] Arguably, this passage is not a factual error at all, because counsel and the director are in agreement that the petitioner has made no significant contributions as a gastroenterologist.